IN THE

Supreme Court of the United States

October Term, 1947. No. 331

RUDY E. CALLEN,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF UNITED RAILROAD WORKERS OF AMERICA, C. I. O.

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CASES CITED

	PAGE
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209	3
Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 263, 264	4
Garrett v. Moore-McCormack Co., 317 U. S. 239, 248	4
Holden v. Hardy, 169 U. S. 366, 397	4
N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U. S. 1, 33	4
Ricketts v. P. R. R., 153 F. 2d 757, 760	4

STATUTE CITED

Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq. 2, 4, 5

AUTHORITY CITED

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of the United Railroad Workers of America, C. I. O., respectfully represents:

The United Railroad Workers of America, C. I. O., here begs leave to intervene and file a brief, amicus curiae, because of the immense importance of the issue involved.

Personal injury cases are not usually the subject matter directly considered in contracts of employment negotiated

between the employer and a union on behalf of all the employees. Questions, such as wages, hours of employment, working conditions, and other normally associated problems, are discussed and bargained about, and contracts are executed that assure fair, reasonable and uniform treatment. Personal injuries sustained by employees are not, and realistically cannot be, the subject matter of labor contracts. The variations in type of the injuries, the extent and the period of disability, the uniqueness of the injury as it affects the individual employee and his physical and psychical reaction thereto, his own financial resources upon which he needs to rely during the long period of enforced unemployment due to his disability and the resultant inability to resist the tempting, but small and totally inadequate sum offered in payment of the injury,—all combine to render useless any attempt to make personal injury matters a subject of contract negotiations.

In recognition of these difficulties, practically all of the states have workmen's compensation laws which set up a sum certain per week for disabilities occurring as a result of the employment.

Railroad employees in interstate commerce do not come under these state compensation acts. The remedies and measure of damages under the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq., are never positive, never liquidated, and not possibly the subject of pre-determination. The Federal Employers' Liability Act, like all laws, can be only as effective as its enforcement and its practical application.

However deserving the case, the railroad can, if it desires, sit back and refuse to negotiate a settlement or pay a dollar until a final, unappealable judgment has been obtained in the appellate courts. This means that a railroad family, in which the breadwinner has been disabled or killed, may be without any means of support for two or three years until the successful termination of the litigation. This creates a *practical problem* intrinsically inherent in the problem of

law here at hand. It requires a practical approach and decision.

After a few months, or even a few weeks, of unemployment, the economic strain is so great on the injured that he is ready to take any amount of cash that will pay his immediate bills. That was the situation in the instant case. The employee was already $500 behind in wages. There was no money with which to buy groceries. A new baby was momentarily expected. A paltry $250 was accepted in settlement and a full and final release executed on the blithe assurances of a trained and hardened claim agent that the employee's injuries were but temporary and that the employee could immediately return to work.

The average employee is an honest, sincere individual who wants to work to earn his livelihood and support himself and family. He doesn't want to get hurt, and if hurt, he wants to get better as soon as possible and get back on the payroll as quickly as possible. The railroader wants to retain his seniority to assure his position on the payroll. *He wants to believe his injuries are slight and that he can shortly return to work.*

It is on this class of case, where the injury is not an amputation or one rendered visible by X-ray, that the claim agent thrives. The employee with the ligamenture or musculature of the back disarranged, or with a serious post-concussional syndrome without a fracture of the skull, is the employee most likely not to recognize the seriousness of his injury and most likely to be imposed upon. That is this case.

The employee must be protected against himself,—against his willingness to gamble on future recovery and his very earning capacity.

There is at least as great an inequality in bargaining power between the average injured employee and the large railroad in negotiating a settlement for those injuries; as there was in the ordinary labor cases which called forth the opinions of Chief Justice Taft in AMERICAN STEEL FOUNDRIES v. TRI-CITY CENTRAL TRADES

COUNCIL, 257 U. S. 184, 209; or of Chief Justice Hughes in N. L. R. B. v. JONES and LAUGHLIN STEEL CORP., 301 U. S. 1, 33, and in AMALGAMATED UTILITY WORKERS v. CONSOLIDATED EDISON CO., 309 U. S. 261, 263, 264.

The same inequality in bargaining in seamen's personal injury cases that brought forth the opinions of Mr. Justice Story in HOLDEN v. HARDY, 169 U. S. 366, 397, and Mr. Justice Black in GARRETT v. MOORE-McCORMACK CO., 317 U. S. 239, 248, should provoke a like ruling and opinion in railroad cases.

A classic concurring opinion by Judge Frank in RICKETTS v. P. R. R., 153 F. 2d 757, 760, so holds.

The rationale followed in the HOLDEN and GARRETT cases, supra, commands the same conclusions in these railroad cases. So, in a note, 5 Univ. of Chic. L. Rev. (1938), 446, we find the writer suggesting:

> "But it is believed that in many cases the individual tort claimant being solicited to release his claims is not in a position to defend his own interests even in the absence of coercive or fraudulent conduct on the part of his obligor, especially where that obligor is a powerful business organization, such as a railroad or insurance company. The prospect of a long and costly legal battle with such an opponent, often commanding almost unlimited resources, is enough to deter all but the most courageous or the most vindictive from taking action, especially where a tempting compromise settlement is offered in consideration of a release. It is conceivable that relief might be obtained in equity where gross inadequacy of benefits received or other circumstances render the agreement so unconscionable as to warrant equitable action."

We ask that the burden of establishing the validity of a release taken from a railroad employee under the Federal

Employers' Liability Act be placed on the railroad, and that, where but a nominal sum has been paid, which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of fact, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of the injuries. *They never over-pay.*

All we are asking is that, in cases where the employee has executed a full release for a nominal sum, the release be held to be payment *pro tanto* only, and not a deterrent to the recovery of a sum within the range expressed by the measure of damages set forth in the Statute.

American railroads will not, by such a ruling, be unfairly deprived of anything they are entitled to. They will merely not be permitted to have unjust enrichment at the expense of the suffering of injured railroaders and their widows and orphans who have been imposed upon by claim agents who obtained releases for pitifully small sums.

In this case, this railroad unblushingly seeks to settle a $25,000 injury judgment for $250. It offered no medical testimony to deny the extent of this man's injuries, although it had had him examined. This disparity speaks for itself and, we respectfully submit, calls for reversal of the principle of law which the United States Circuit Court of Appeals (3rd) dug up of its *own accord,* and upon which it rested its order setting aside the judgment and grant of a new trial to the railroad. In the meantime, a crippled employee, his wife and three children literally starve while awaiting the harassment and tribulations of a new trial.

The recrudescence of this doctrine of release law by the Court below (the first of its kind in railroad employee injury cases) is indeed a far cry from the things said and done by Congress in 1908 when it added Section 5 to the Federal Employers' Liability Act, which all American Railroad Labor thought would prevent the unfair and inequi-

table result now reached below. We urge that certiorari be granted.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
Counsel for United Railroad Workers of America, C. I. O., Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES

No. 331.—October Term, 1947.

Rudy E. Callen, Petitioner, v. Pennsylvania Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 12, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Plaintiff, a railroad brakeman, brought this action under the Federal Employers' Liability Act, 35 Stat. 65; 53 Stat. 1404; 45 U. S. C. § 51. He recovered a jury verdict of $24,990, but the Circuit Court of Appeals reversed because of errors in the charge by the District Judge and ordered a new trial. The plaintiff's claim as submitted to the jury was negligence on the part of an engineer in effecting a coupling operation at a speed which plaintiff thought would jolt him off the stirrup of the car he was riding. In jumping for safety, he claimed to have received a severe and permanent back injury. The defendant denied the occurrence, offered testimony that plaintiff did not work at the time in question and also evidence of his admission that he did not work on that day but instead shoveled snow to get his car out of the garage. It also was testified that he had told his conductor he hurt his back on a different occasion. But if the injury was sustained at the time and place alleged, the defendant denied negligence, claimed contributory negligence and pleaded a general release. The controversy here concerns the release.

It was proved and not denied that for a consideration of $250 the plaintiff executed a general release of "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me" at the time

and place involved in the suit. It also released claims for loss of time and expense, and recited that the payment was in compromise and not an admission of liability, that plaintiff read and understood the agreement and that the sum of money stated therein is all that he was to receive.

On the trial, the plaintiff testified that he read and understood the release, knew what he was doing, and intended to waive any further claim, and that when he began talking settlement he said he should have between $300 and $350. No fraud was alleged, but the plaintiff testified that he executed the release in reliance on the claim agent's assurance that "there was nothing wrong" and that he "could get back to the job."

At the trial, plaintiff offered evidence from which the jury might well find that he had a permanent and serious injury. The claim agent admitted that at the time of settlement he did not know the plaintiff was suffering the injury which the doctors at the trial described. The plaintiff had gone to a family physician who taped his back and to a chiropractor whose report plaintiff took with him to the claim agent. It did not diagnose permanent injury but did suggest a weakness making him more susceptible to recurrence. The Railroad procured no medical examination of plaintiff. The claim agent's testimony was that he determined the amount of the settlement on the basis of his belief that there was no liability.

Instructing the jury, the trial court stated:

> "Anyhow, they settled to the extent of $250.00 and the release has been offered in evidence and admitted, and both sides agree that the release was not in contemplation of any sort of permanent injury.
>
> . . . . . .
>
> "Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict

for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it, to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured . . . ."

The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: "This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries."

An examination of the record at the trial makes it clear that the issue was raised and sharply litigated as to whether the injury, if received by plaintiff in the manner alleged, was permanent in character. Only when and if this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court, however, resolved the issue of permanence of injury against the defendant, at least so far as the release was concerned, and on that basis withdrew consideration of that issue from the jury. Even if the issue of permanence were resolved against the defendant, an issue still existed as to validity of the release

since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.

It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict "for the plaintiff, and assess the damages of $25,240.00, of which the Railroad is to be reimbursed with $250.00." The court, saying he wanted to make the record right, asked the jury if that made a net finding of $24,990, which the foreman said they did. Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question.

While the trial court assumed a finding of permanency as a basis for his setting aside of the release, after challenge to his assumption as to the nature of the injuries he made every effort to correct the impression, insofar as it affected the issue of damages. But the trial court did not correct or in any way alter his determination that the release was not binding insofar as it rested on the assumption of permanent injury. The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error.

We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It

is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases. The *amicus* brief puts it that "We ask that the burden of establishing the validity of a release taken from a railroad employe under the Federal Employers' Liability Act be placed on the railroad. And that where but a nominal sum has been paid which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of facts, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of injuries . . . ." Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 760. However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void." 35 Stat. 66, 45 U. S. C. § 55. It is obvious that a release is not a device to

exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Since we believe the Court of Appeals was right in directing a new trial at which the jury shall be permitted to pass on all issues of fact, the judgment is

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE, being of the view that releases under the Federal Employers' Liability Act should be governed by the same rule which applies to releases by seamen in admiralty (see the separate opinion of Judge Jerome Frank, *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 767–770), dissent from an affirmance of the judgment.